Supreme Court, U.S.
FILED
DEC 14 2000
CLERK

No. 00-686

IN THE

Supreme Court of The United States

MARY NEIDIG, DIRECTOR, DEPARTMENT OF CONSUMER AND BUSINESS SERVICES OF THE STATE OF OREGON,
Petitioner,

v.

NATIONAL WARRANTY INSURANCE COMPANY RRG, A RISK RETENTION GROUP
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

HARDY MYERS
ATTORNEY GENERAL OF OREGON
DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL
MICHAEL D. REYNOLDS *
SOLICITOR GENERAL
ROBERT M. ATKINSON
DENISE G. FJORDBECK
ASSISTANT ATTORNEYS GENERAL
400 Justice Building
Salem, Oregon 97301-4096
(503) 378-4402

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
I. The circuits are divided on an issue important to the States, to the RRG industry, and to consumers	1
II. The importance of the pre-emption issue underscores the need for this Court's review	5
III. Congress did not intend to pre-empt state laws designed to protect the public consumer of insurance protection	6

TABLE OF AUTHORITIES

Cases	Page
Charter Risk Retention Group Ins. Co. v. Rolka, 796 F. Supp. 154 (M.D. Pa. 1992)	2
Cipollone v. Liggett Group, 505 U.S. 504 (1992)	5
Dept. of Rev. of Oregon v. ACF Industries, 510 U.S. 332 (1994)	5
Fuller v. Oregon, 417 U.S. 40 (1974)	3
Garage Services v. Homes, 867 F. Supp. 1301 (E.D. Ky. 1994)	2
Home Warranty Corp. v. Caldwell, 777 F.2d 1455 (11th Cir. 1985)	6
Mears Transp. Group v. Florida, 34 F.3d 1013 (11th Cir. 1994), cert. denied, 514 U.S. 1109 (1995)	1, 2
Minnesota Mining v. New Jersey Wood F. Co., 381 U.S. 311 (1965)	3
National Risk Retention Ass'n v. Brown, 927 F. Supp. 195 (M.D. La. 1996), affirmed 114 F.3d 1183 (5th Cir. 1997)	2
National Warranty Ins. Co. v. Greenfield, 24 F. Supp. 2d 1096 (D. Or. 1998)	2
National Warranty Ins. Co., RRG v. Greenfield, 214 F.3d 1073 (9th Cir. 2000)	1
Ophthalmic Mut. Ins. Co. v. Musser, 143 F.3d 1062 (7th Cir. 1998)	1, 2
Preferred Physicians Mut. Risk Retention v. Pataki, 85 F.3d 913 (2d Cir. 1996)	2
Shapiro v. United States, 335 U.S. 1 (1948)	3
United States v. Locke, 529 U.S. 89, 120 S.Ct. 1135 (2000)	6

Statutory Provisions	
15 U.S.C. § 3902(a)(4)	2, 5
15 U.S.C. § 3905(d)	1, 2, 5

I. The circuits are divided on an issue important to the States, to the RRG industry, and to consumers.

Respondent suggests that the split between the circuits is narrower than Oregon claims, arguing that a "true split lies only between the Ninth and Eleventh Circuits." Opp. 8 (citing *Mears Transp. Group v. Florida*, 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995)). Respondent contends that the Seventh Circuit's decision in *Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998), is not truly contrary to the decision here because the Seventh Circuit "did not address the issue of whether the state law at issue improperly discriminated against RRGs[.]" Opp. 9–10 (citing *Ophthalmic*, 143 F.3d at 1065).

To be sure, discrimination was not directly at issue in *Ophthalmic*. Nevertheless, the Seventh Circuit stated that it agreed with much of the Eleventh Circuit's reasoning in *Mears*. *Ophthalmic*, 143 F.3d at 1069. And the Seventh Circuit opinion is squarely at odds with the Ninth Circuit's in at least three significant respects. First, the Seventh Circuit held that, under 15 U.S.C. § 3905(d), "a state can require a licensee to demonstrate that he is insured by a state-licensed insurer, even if this means that non-domestic RRGs turn out to be among the pool of non-qualifying insurers." Thus, the Seventh Circuit agreed that States could exclude RRGs categorically, while the Ninth Circuit held that States could exclude RRGs only individually. *National Warranty Ins. Co., RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000); Pet. App. 15–16. Second, the Seventh Circuit also concluded that "what concerned Congress was a state legislature enacting laws *intending to thwart* RRGs." *Ophthalmic*, 143 F.3d at 1070 (emphasis in original). The Ninth Circuit reached the opposite conclusion: "Congress did not intend to forbid only facial or intentional discrimination by state law." Pet. App. 15. Third, the Seventh Circuit agreed with *Mears* "that, because other sections of the Act specifically give states authority to take action against troublesome RRGs, § 3905(d) must mean

something different." 143 F.3d at 1070 (citing *Mears*, 34 F.3d at 1019). Again, that conclusion is flatly contrary to the Ninth Circuit's reading of the provision and to its opinion here. Pet. App. 10. Thus, although *Ophthalmic* may avoid direct conflict with the Ninth Circuit's decision, the analyses in the two opinions clash repeatedly and irreconcilably. The Seventh Circuit's decision demonstrates that, if directly faced with the issue presented here, it would agree with the Eleventh Circuit and disagree with the Ninth Circuit. Notably, both the circuit and the district courts in this case acknowledged that their decisions were contrary to both *Ophthalmic* and *Mears*. Pet. App. 16; *National Warranty Ins. Co. v. Greenfield*, 24 F. Supp. 2d 1096 (D. Or. 1998); Pet. App. 35–36.

Consequently, the split in the circuits is broader than respondent is willing to admit.[1] And a fourth circuit has identified, though so far managed to avoid resolving, the specific discrimination question presented here. *See Preferred Physicians Mut. Risk Retention v. Pataki*, 85 F.3d 913, 917–18 (2d Cir. 1996) (under section 3902(a)(4), "discrimination against a particular class is not proven merely by showing that the class is part of a larger group that suffers some competitive disadvantage"; holding that a showing of "discriminatory intent" is "sufficient to make out a claim under § 3902(a)(4)," citing *Mears*; and withholding judgment on whether a showing of an "unintended disparate impact" can suffice).

---

[1] District courts are similarly divided. *Compare Garage Services v. Homes*, 867 F. Supp. 1301, 1308 (E.D. Ky. 1994) (Kentucky law similar to Oregon's does not violate anti-discrimination provisions of LRRA); *National Risk Retention Ass'n v. Brown*, 927 F. Supp. 195, 199-200 and n. 24 (M.D. La. 1996), *affirmed* 114 F.3d 1183 (5th Cir. 1997) (section 3905(d) does not prohibit state from discriminating against licensee if its proof of financial responsibility is insurance from RRG; citing *Mears*); and *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154, 159 (M.D. Pa. 1992) (under section 3905(d), state financial responsibility laws can bar RRGs individually but not categorically; purposeful discrimination not required).

But even if the conflict between the circuits were as limited as respondent argues, the case still would warrant this Court's attention. Notwithstanding precisely how many courts disagree on the answer to the question presented, that question independently merits review by this Court because of its importance to the States, to the RRG industry, and to consumers. *See Fuller v. Oregon*, 417 U.S. 40, 42 (1974) (*certiorari* granted "[b]ecause of the importance of the question presented" and because of a conflict in resolving it); *Minnesota Mining v. New Jersey Wood F. Co.*, 381 U.S. 311, 314 (1965) (noting "the importance of the question [presented] in the administration" of a federal act); and *Shapiro v. United States*, 335 U.S. 1, 4 (1948) (case "involves an important question of statutory construction").

The question presented here is important for at least three reasons. First, as Oregon noted in its petition,[2] most States have enacted legislation indistinguishable from Oregon's law with respect to the significant issue presented here. Second, the presently existing conflict appears likely to persist and to widen, leaving both the States and RRGs uncertain about the validity and enforceability of those state laws. Third, as discussed in section II., below, the case involves the proper construction of an ambiguous "savings" provision where the scope, but not the fact, of pre-emption is in doubt.

Respondent comes close to agreeing that the question presented is an important one meriting this Court's attention. Respondent does not dispute that "over half the states have enacted a service contract regulatory scheme similar to that embodied in" Oregon's statutes. Opp. 24. Respondent's only quarrel with that point is to observe that two States—Wyoming and Oklahoma—have enforcement policies that differ from Oregon's. Opp. 24–25. That observation does

---

[2] Pet. 27–28 n. 20.

little to diminish the importance of this issue to the many other States with similar statutes. In any event, respondent's observation misses the point. The issue here turns on whether these state laws are pre-empted as written, and not on how some States, possibly influenced by uncertainty about the scope of pre-emption, *see* Opp. 4–5 and n. 5, may choose to enforce them.

Moreover, respondent candidly concedes that the issue presented is significant to RRGs as a class, as well as to their members. In fact, respondent emphasizes how "important" the Ninth Circuit's decision in this case is "to the RRG industry and RRG members[.]" Opp. 25. That admission appears almost to invite this Court to grant the petition. Indeed, respondent's only counter to its own admission is to assume, with scant support, that the Ninth Circuit's decision is correct. Opp. 11. That is an argument on the merits, not one against the granting of *certiorari*. Furthermore, given the depth of the split in the circuits and the difficulty of the issues, respondent's assumption that the Ninth Circuit's analysis is "so compelling" that other circuits will adopt that analysis and make it unnecessary for this Court to resolve the existing conflict, *ibid.*, appears more wishful than realistic. As the Ninth Circuit itself acknowledged, "[t]his is a close case[.]" Pet. App. 16. Given that fact and the split that already exists, it appears more likely that the conflict in the circuits will persist and widen.

In sum, as respondent tacitly admits, resolution of the federal statutory interpretation and pre-emption issues presented here is important to most of the States, to RRGs, and to their members. For that reason alone, this case would warrant this Court's review. The addition of the undeniable conflict in the circuits highlights the case's importance.

II. The importance of the pre-emption issue underscores the need for this Court's review.

Respondent accuses Oregon of advocating a new and extreme approach to pre-emption that would excuse courts from construing statutes if the task proved "daunting," and that would frustrate Congress's ability to legislate. Opp. 20–21. Those hyperbolic claims unfairly characterize Oregon's reliance on established principles. Despite respondent's contention to the contrary, Opp. 22, those principles hold that, even where Congress expressly pre-empts the States' historic police powers, the Court will not infer a scope of pre-emption beyond that clearly mandated by the statutory language, "absent unambiguous evidence." *Dept. of Rev. of Oregon v. ACF Industries*, 510 U.S. 332, 345 (1994) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring)).

Oregon asserts that section 3905(d) must be read in light of the presumption that Congress did not intend to pre-empt the exercise of its police-power regulations. That presumption "reinforces the appropriateness of a narrow reading" of section 3905(d). *See Cipollone*, 505 U. S. at 518. Respondent, although rejecting that contention, acknowledges, as it must, that whether section 3905(d) must be read in light of the presumption against pre-emption is not free from doubt. Opp. 22.[3]

---

[3] And although respondent may be technically correct in asserting that the Ninth Circuit's opinion does not specifically refer to 15 U.S.C. § 3905(d) as ambiguous, Opp. 21, the court expressly acknowledged the "inherently ambiguous" character of the critical term "discriminate," which appears in 15 U.S.C. § 3902(a)(4) and is specifically cross-referenced in section 3905(d) ("Subject to the provisions of section 3(a)(4) [§ 3902(a)(4)] relating to discrimination . . . ."). Pet. App 13. The court added: "Not surprisingly, the meaning of 'discriminate,' as used in § 3902(a)(4), is not altogether clear." *Ibid.*

That doubt provides another reason why this case merits this Court's review. Questions about the meaning of savings provisions arise in a variety of contexts. In *United States v. Locke*, 529 U.S. 89, 120 S.Ct. 1135 (2000), on which respondent relies, a long-standing and extensive pattern of federal regulatory authority led the Court to construe an ambiguous savings clause to avoid overturning historically settled understandings about the primacy of federal authority. 120 S.Ct. at 1147–48. Here, however, the savings provision arises in a sharply differing context, in which historic understandings all weigh in favor of state, rather than federal, authority. Thus, the question presented is whether, in such a context, the savings provision must be construed in light of the presumption that Congress preserved the States' historic regulatory powers except to the extent that unambiguous evidence leads to the contrary conclusion. *See ibid.* That question is important as a matter of federalism; the proper interpretation of the LRRA is important to the States as a matter of their regulatory authority to protect consumers. For both reasons, this case warrants this Court's review.

III. Congress did not intend to pre-empt state laws designed to protect the public consumer of insurance protection.

Finally, respondent rewrites history when it suggests that exempting RRGs from state guaranty funds reflects congressional recognition of their economic strength. Opp. 2 n. 2; *see also* Opp. 19; Opp. 24 n. 22. RRGs are exempt from state regulations, including guaranty funds, because Congress intended RRGs to be self-insurance schemes for well-informed businesses and professionals that reasonably can judge for themselves the degree of risk they are willing to accept. But Congress did not intend to expose the consumer who purchases a service contract to the risk of RRG insolvency. *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1468 (11th Cir. 1985) (Congress based scope of pre-emption on

limited field of customers to whom RRGs sold insurance; states' regulatory interests not implicated because RRGs did not sell to the public).[4] Nor is it accurate to insist that the risk of an RRG's insolvency falls on its "members," rather than on the consumer. Opp. 19–20. The fly-by-night merchant is, of course, the one most likely to seek out a fly-by-night insurer to meet its financial responsibility requirements at the lowest possible cost. Only the guaranty fund protects consumers from that risk.

Respectfully submitted,

HARDY MYERS
ATTORNEY GENERAL OF OREGON
DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL
MICHAEL D. REYNOLDS *
SOLICITOR GENERAL
ROBERT M. ATKINSON
DENISE G. FJORDBECK
ASSISTANT ATTORNEYS GENERAL
400 Justice Building
Salem, Oregon 97301-4096
(503) 378-4402

* Counsel of Record

Counsel for Petitioner

---

[4] Respondent also challenges Oregon's consumer protection purpose by asserting that Oregon would permit a domestic RRG to sell financial responsibility insurance. *E.g.*, Opp. 3, 19. The Ninth Circuit recognized that that is a matter of some dispute. Pet. App 5 and n. 3. But the court expressly decided the case in light of its conclusion that domestic RRGs do not meet the requirements of the OSCA. Pet. App 5 (OSCA "effectively precludes *all* RRGs" from providing financial responsibility insurance). (Emphasis added.)